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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Changes to the Board of	)	
Directors of the National Exchange	)	CC Docket No. 97-21
Carrier Association, Inc.	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

JOINT PETITION FOR RECONSIDERATION

Nevada Bell, Pacific Bell, and Southwestern Bell Telephone Company ("Petitioners") file this Petition for Reconsideration of the Commission's Report and Order and Second Order on Reconsideration, FCC 97-253 ("Order"), which was published in the Federal Register on August 1, 1997. *See* 62 Fed. Reg. 41294.

In the Universal Service Order,[1] the contribution base for the federal universal service support fund was established as "revenues derived from end users for telecommunications and telecommunications services." Universal Service Order, ¶ 844. The Commission specifically stated that

> [n]either telecommunications carriers nor non-telecommunications carriers will be required, however, to contribute to federal universal service support mechanisms based on their provision of Internet access or non-telecommunications internal connections.

Universal Service Order, ¶ 597 (emphasis added). However, those revenues are included in the contribution base in line 34 of the Universal Service Worksheet, FCC Form 457, adopted in Appendix C of the Order ("Worksheet"). Whether that inclusion is the result of inadvertence or

[1] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157 (May 8, 1997) ("Universal Service Order").

reconsideration, the Commission should modify the Worksheet to eliminate the inclusion of any inside wire revenues (and any other non-regulated revenues) from the calculation of universal service contributions.

With this Petition, none of the Petitioners are waiving, limiting, or otherwise prejudicing arguments that may be made in appeals from the Universal Service Order. Moreover, by submitting completed Worksheets as required by the Order and Commission Rules, the Petitioners do not waive, limit, or otherwise affect this Petition or those appeals.

Inclusion of Inside Wire Revenues Is Contrary to and Not Authorized by the Universal Service Order, the Commission's Rules, Previous Commission Decisions, and the 1934 Act.

The inclusion of any non-telecommunications revenue, including inside wire maintenance revenues, is contrary not only to the Universal Service Order, but also Commission Rules, prior Commission decisions, and the Communications Act of 1934, as amended ("1934 Act"). Moreover, its inclusion is entirely unexplained in the Order. The Commission must therefore modify the Worksheet to remove those revenues from the calculation.

As clearly shown, the Commission decided in the Universal Service Order that revenues from non-telecommunications inside wire[2] were not to be included in the contribution base. That decision was codified in the Commission's Rules at 47 C.F.R. § 54.703(b) and (c), each of which states that the base shall to be "end-user telecommunications revenues." *See also* 47 C.F.R. § 54.709(a)(1). Inside wire does not qualify as "telecommunications" or a "telecommunications service" as it is not a part of a carrier's network and exists only on the customer side of any

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[2] The use of "non-telecommunications inside wire" appears to be a reference to the use of wireless alternatives to physical wiring or cabling. *See* Universal Service Order, ¶ 457.

demarcation point. The 1996 Act[3] defined "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Similarly, "telecommunications service" means, in pertinent part, "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46).

Neither of those definitions encompass inside wire or, more broadly, "internal connections,"[4] as the Commission has itself affirmed in the Universal Service Order.

> We find that, as discussed above, the Act permits universal service support for an expanded range of services beyond telecommunications services. Specifically, we include [] the installation and maintenance of internal connections . . .

Universal Service Order, ¶ 451 (emphasis added). Correspondingly, the entire Universal Service Order, in its structure and discussion, treats internal connections and inside wire as separate and apart from telecommunications or telecommunications services.

That treatment just re-affirmed earlier Commission decisions that inside wire is a non-

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104; 110 Stat. 56 (1996) ("1996 Act").

[4] As defined by the Commission, "internal connections" clearly encompasses both the installation and maintenance of simple and complex inside wire.

> Internal connections. A given service is eligible for support as a component of the institution's internal connections only if it is necessary to transport information to individual classrooms. Thus, internal connections includes items such as routers, hubs, network file servers, and wireless LANS and their installation and basic maintenance because all are needed to switch and route messages within a school or library.

47 C.F.R. § 54.500(a)(2). *See also* Universal Service Order, ¶ 457 (discussion of "internal connections through inside wiring").

common carrier offering.[5] During the detariffing of inside wire, the Commission stated that:

> we have recognized that customers determine the location and service life of inside wiring, and that the telephone company's responsibility for wiring ends at the demarcation point when the telephone company does not own the inside wiring. . . . Like CPE services, inside wiring installation and maintenance are severable from underlying common carrier transmission services, . . .

Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, 1 FCC Rcd 1190, 1192 ¶ 16 (1986) (emphasis added) (footnotes omitted). Inasmuch as the 1934 Act's definition of "telecommunications" is premised on "transmission," the inclusion of inside wire revenues is contrary to this Commission decision in particular.

Moreover, the Commission wholly failed to provide any explanation of why inside wire revenues are included in the universal service contribution calculation. Although the adoption of the Worksheet is largely treated as a procedural matter, several decisions were made that affect the contribution calculation and the final amount due from an interstate carrier. Failure to articulate a sufficient reason for a decision, particularly one so inconsistent with the Universal Service Order that the Worksheet is purportedly implementing, is unlawful.[6]

In any event, inclusion of inside wire revenues in the funding base is not authorized by the 1934 Act, and is inequitable and discriminatory in violation of 47 U.S.C. § 254(d). The 1996 Act only requires that a "telecommunications carrier that provides interstate telecommunications services" contribute. 47 U.S.C. § 254(d). Although Petitioners are interstate telecommunications

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[5] *See, e.g., Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Cos.*, 85 FCC 2d 818 (1981), recon., 89 FCC 2d 1094 (1982), further recon., 92 FCC 2d 864 (1983); NARUC v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[6] *See* Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172, 1173 (D.C. Cir. 1994).

carriers, they are not acting as a carrier when offering inside wire installation or maintenance. Those activities are not "telecommunications," are not "telecommunications services," and are not common carrier offerings. Accordingly, revenues from those offerings (as well as any other non-telecommunications revenues) cannot lawfully be used as part of the contribution base. *See* 47 U.S.C. § 153(44) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent it is engaged in providing telecommunications services, . . ."). This conclusion is confirmed by the fact that the Commission is only authorized to require other providers of interstate telecommunications to contribute to universal service; it is not authorized, for example, to demand universal service contributions from electricians who install and maintain inside wire. 47 U.S.C. § 254(d); Universal Service Order, ¶ 597. Congress has clearly tied funding to the offering of telecommunications or telecommunications services, and has not granted the authority to tax generally the revenues of interstate carriers or others that provide telecommunications.

Indeed, it is plainly inconsistent, inequitable, discriminatory, and contrary to the principle of competitive neutrality to use carriers' revenues from their non-regulated inside wire activities to determine their universal service contributions, while electricians and other non-carriers competing against those carriers pay nothing into the fund but can receive support. The Commission previously concluded that it would not be competitively neutral to preclude those

non-carriers from receiving universal service funding.

> The goal of competitive neutrality would not be fully achieved if the Commission only provided support for non-telecommunications services such as Internet access and internal connections when provided by telecommunications carriers. In that situation, service providers not eligible for support because they are not telecommunications carriers would be at a competitive disadvantage in competing to provide these services to schools and libraries, even if their services would be more cost-efficient.

Universal Service Order, ¶ 594. In the same fashion, using inside wire revenues for the contribution calculation unfairly and unreasonably burdens carriers' inside wire offerings and their prices to the detriment of their ability to compete with non-carriers, especially if a carrier attempts to pass-through the contribution attributable to inside wire revenues to inside wire customers. To remain competitive with the non-carriers' inside wire offerings, the carrier may have to do exactly what Section 254 was meant to eliminate -- the recovery of costs attributable to one customer from another. That unreasonable result is sharply seen with incumbent LECs, who will be required to recover contribution amounts attributable to inside wire revenues (a non-regulated activity) in the rates for interstate access services (a regulated activity).

Finally, the inclusion of inside wire revenues (as well as any other non-regulated revenues) is arbitrary and unreasonable in that the Commission has made each carrier's corporate structure the determinant of whether those revenues are included in the calculation. For apparent business reasons, Petitioners and many other carriers have decided to offer inside wiring directly instead of having an affiliate participate in that market. If the opposite decision had been made, inside wire revenues would not be included in the contribution calculation. In other words, the affiliate would be like any other non-carrier offering inside wiring, and not subject to Section 254(d). Basing that different treatment on such a distinction is arbitrary and unreasonable, as well as

unexplained and unsupported by the record. Elsewhere, with regard to payphone operations, the Commission demonstrated its sensitivity to corporate structural differences in deciding contribution issues.[7] The Commission also correctly decided not to include other non-regulated revenues and non-telecommunications revenues in the contribution calculation.[8] The Commission should rule consistently here, and eliminate inside wire and any other non-regulated revenues from the calculation of a carrier's contributions.

The Commission must modify its Rules and the Worksheet in order to eliminate the inclusion of any inside wire revenues and any other non-telecommunications revenues from the calculation of end-user telecommunications revenues and universal service contributions. At a minimum, this means eliminating those revenues from line 34, which expressly includes "inside wiring maintenance" revenue.

Much of the Information Required To Be Provided is Unnecessary, Overbroad, and Unauthorized.

The sole reason for the issuance of the Worksheet is "to determine contribution amounts"[9] which are based on "revenues derived from domestic end users for telecommunications or telecommunications revenues." 47 C.F.R. § 54.709(a)(1). The Worksheet has no other purpose; it was issued solely under the authority granted by 47 U.S.C. § 254.[10] Yet much information

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[7] Universal Service Order, ¶¶ 795, 797, 798.

[8] Worksheet, line 49 ("Enhanced services, billing and collection, customer premises equipment, published directory, and non-telecommunications products and service revenues").

[9] Worksheet, p. 3.

[10] Worksheet, p. 3 ("The collection of information stems from the Commission's authority under Section 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 254."; "The Commission is authorized under the Communications Act of 1934, as amended, to collect

required to be submitted in the Worksheet delves into areas having nothing to do with end user revenues, or even telecommunications or telecommunications services. In fact, the Worksheet candidly acknowledges that the extra information will not be used for that calculation - "Revenue from Other Contributors," *i.e.*, carriers or non-end users, and most explicitly, "Other revenue that will not be included in the contribution base" (emphasis added). *See also* discussion above on inside wire revenue. In this regard, the Worksheet stands in stark contrast with FCC Form 431, the TRS Fund Worksheet, which asks for revenue information in much less detail and is limited to only those revenues used in the calculation. Collecting the revenue information not used in the contribution calculation is inconsistent with previous Commission information collection practices, unnecessary, overbroad, not supported by the record, not authorized by Section 254, and otherwise unreasonable.

In this regard, Petitioners also note that the Commission has requested comments on the Worksheet as required by the Paperwork Reduction Act of 1995. *See* 62 Fed. Reg. 44966.

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the personal information we request in this form. We will use the information you provide to determine contribution amounts.") Although the Commission has also cited 47 U.S.C. § 154(i) in the notice required by 5 U.S.C. § 552a(e)(3), the provision grants no independent authority for the general collection of information. That generic 'necessary and proper' clause is not itself a grant of substantive authority, but rather empowers the Commission to execute the substantive authority granted elsewhere in the statute and even then only empowers those actions "not inconsistent with this Act." *See* California v. FCC, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990); AT&T v. FCC, 487 F.2d 865, 877 (2nd Cir. 1973).

Conclusion

For premises considered, Petitioners respectfully request that the Commission reconsider the Order and modify the Worksheet in accordance herewith.

Respectfully submitted,

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